IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO. 15 OF 2004

Santan Financers & Real Estate
Pvt. Ltd., having its Office at
S-15, Sanzgiri Arcade, Colva,
Salcete, Goa, represented by
its Managing Director,
Miss Deepali S. Kumar ... Appellant

versus

1. Shri Devapa A. Sarvi,
   Proprietor of Sarvi Constructions,
   Major in age, residing at C-49,
   Classic Apts., Near Maruti Temple,
   Layamati, Davorlim, Salcete, Goa.

2. State of Goa by the Public
   Prosecutor. ... Respondents

Mr. A. F. Diniz, Advocate for the Appellant.

Mr. C. Coutinho, Advocate for Respondent No.1.

Mr. S. N. Sardessai, Public Prosecutor for Respondent No.2.

CORAM: N. A. BRITTO, J.

DATE : 10TH DECEMBER,2004.

ORAL JUDGMENT(PER N.A.BRITTO,J.)

This is complainant's appeal against the acquittal of the

accused under Section 138 of the Negotiable Instruments Act, 1881 (Act, for short) by Judgment/Order dated 12-12-2003 of the learned Judicial Magistrate, First Class, Margao.

2. The case of the complainant was that the accused had issued to the complainant a cheque No.0310348, dated 1-9-2000 for Rs.50,000/-, drawn on Madgaum Urban Co-operative Bank Ltd. towards money which was due and payable to the complainant by the accused, and, when the complainant presented the said cheque for payment through its bankers, namely, Indusind Bank Limited the same was returned with endorsement “funds insufficient” as intimated by the said Indusind Bank Limited to the complainant on 10-1-2001.

3. The complainant claimed that thereafter, he issued a legal notice to the accused dated 18-1-2001 by Registered Post A.D. informing the accused about the cheque and calling upon the accused to make payment due on the said cheque within 15 days. According to the complainant, the accused was intimated about the notice by postal authorities on 26-1-2001 and the said postal notice was returned by the postal authorities, and, as the accused failed to make the payment, the complainant filed the complaint against the accused under Section 138 of the Act.

4. In support of the complaint, the complainant, which is a registered company, examined its Managing Director and produced the necessary documents, namely, a resolution of the Company, the said cheque, the memo of return of cheque unpaid, the postal article /notice returned by the Postal Authorities and a copy of notice. The accused did not produce any evidence, but in his statement recorded under Section 313 of the Code of Criminal Procedure, 1973 (Code, for short), stated that he had issued the said cheque as a security and not by way of any liability. The accused also stated that he was a Contractor and had taken up the contract of erecting a building for the complainant-Company which owed to him Rs.3 lakhs and a half and he had filed a Civil Suit against the said Company for the recovery of the same. The accused stated that he did not owe any amount to the Company.

5. The learned Judicial Magistrate, First Class, after assessing the evidence produced by the complainant acquitted the accused under Section 138 of the Act on three counts. Firstly, the learned Judicial Magistrate, First Class, held that P.W.1, Deepali Kumar, as a Managing Director of the complainant-Company had no authority to file the complaint and to depose on behalf of the Company. Secondly, the learned Judicial Magistrate, First Class, held that the notice of demand was not duly served on the accused. Thirdly, the learned Judicial Magistrate, First Class, also held that the evidence of complainant was shaken in cross-examination on the

point of actual liability of the accused and that the accused had succeeded in creating a reasonable doubt about the claim of complainant of his existing liability.

6. According to Mr. C. Coutinho, the learned Counsel appearing on behalf of the accused, the learned Judicial Magistrate, First Class, has actually held that the presumption available to the complainant that the cheque was issued towards the discharge of existing debt or liability was rebutted by the accused, though the learned Judicial Magistrate, First Class did not state the same in so many words.

7. On the first count, Mr. A. F. Diniz, the learned Counsel appearing on behalf of the complainant, in support of his submission that P.W.1, Deepali , being the Managing Director of the complainant-Company and having produced the resolution-Exh.1, signed by the Chairman of the Company had authority to file the complaint and depose on behalf of the complainant has placed reliance on the case of **United Bank of India** v. **Naresh Kumar and others**((1996) 6 SCC 660) and **M/s. M.M.T.C. Ltd. and another** v. **M/s.Medchl Chemicals and Pharma(P) Ltd.** (AIR 2002 SC 182).

8. I need only refer to this last decision, in view of the concession fairly made by Mr. Coutinho, the learned Counsel of the accused that the learned Judicial Magistrate, First Class was not right

on this count. Indeed, in the case of **M/s. M.M.T.C. Ltd. and another** v. **M/s. Medchl Chemicals and Pharma(P) Ltd.**(supra) the Supreme Court stated that as far back, as in the case of **Vishwa Mitter** v. **O.P. Poddar** reported in (1983) 4 SCC 701, the Supreme Court had held that it is clear that anyone can set the criminal law in motion by filing a complaint of facts constituting an offence before a Magistrate entitled to take cognizance. The Court further observed that no Court can decline to take cognizance on the sole ground that the complainant was not competent to file the complaint. It has been held that if any special statute prescribes offences and makes any special provision for taking cognizance of such offences under the statute, then the complainant requesting the Magistrate to take cognizance of the offence must satisfy the eligibility criterion prescribed by the statute. The Court further observed that in that case the only eligibility criterion prescribed by Section 142 was that the complaint must be by the payee or the holder in due course. This criterion was satisfied as the complaint was made in the name and on behalf of the appellant-Company.

9. As already stated, the complaint in the case at hand was filed by the Company through its Managing Director pursuant to the resolution passed by the Board of Directors of the said Company which was signed by the Chairman and produced at Exh.11 before the learned Judicial Magistrate, First Class. In the light of that, the complaint could not have been dismissed for want of authority on the

part of the said Managing Director either to file the complaint or to depose on behalf of the said complainant.

10. On the second count, on behalf of both parties reliance has been placed on various Judgments. As far as the facts go it was stated by the complainant in the complaint that the complainant had issued a legal notice to the accused dated 18-1-2001 by Registered Post A.D. calling upon the accused to make the payment within 15 days. P.W.1, Deepali , had produced the said postal article at Exh.15, an article which was returned by the Postal Authorities and apparently with two endorsements, one “intimated” and the other “out of station return to sender”. In course of cross-examination, the complainant had denied a suggestion that the said postal article-Exh.15 was returned to the complainant by the Postal Authorities only with the endorsement “out of station return to sender”. The complainant had also denied the suggestion that the endorsement “intimated” was written by the complainant.

11. Mr. Diniz, the learned Counsel of the complainant has submitted that once the postal article was sent to the registered address of the accused there was a presumption of due service in favour of the complainant, a presumption which was not at all rebutted by the accused in this case.

12. On the other hand, Mr. Coutinho, the learned Counsel of

the accused, has submitted that the burden that the accused was intimated regarding the said postal article by the Postal Authorities was upon the complainant and the said burden could have been discharged only by examining the postman.

13. Mr. Diniz, the learned Counsel has placed reliance in support of the aforesaid submission on the case of **The State of M.P.** v. **Hiralal and others** (1996(1) Supreme 753) wherein the Supreme Court observed that “in view of the office report, it would be clear that the respondents obviously managed to have the notice returned with postal remarks “not available in the house”, “house locked” and “shop closed” respectively and in view of that it ought to be deemed that the notices were served on the respondents. Mr. Diniz, also placed reliance on the case of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan and another** (1999 SCC(Cri.) 1284). Before referring to this case, it will not be out of context to refer to the case of **M/s. Madan and Co.** v. **Wazir Jaivir Chand** ((1989) 1 SCC 264) wherein the Supreme Court dealt with a notice despatched by registered post and in this context the Supreme Court observed that all that a landlord can do to comply with this provision is to post an acknowledgement due or otherwise containing the tenant's correct address and once he does this and the letter is delivered to the post office, he has no control over it. It is then presumed to have been delivered to the addressee under Section 27 of the General Clauses Act. Under the rules of the post office, the letter is to be delivered to the addressee

or a person authorised by him. Such a person may either accept the letter or decline to accept it. In either case, there is no difficulty, for the acceptance or refusal can be treated as a service on, and receipt by, the addressee. The difficulty is where the postman calls at the address mentioned and is unable to contact the addressee or a person authorised to receive the letter. All that he can then do is to return it to the sender. The Indian Post Office Rules do not prescribe any detailed procedure regarding the delivery of such registered letters. When the postman is unable to deliver it on his first visit, the general practice is for the postman to attempt to deliver it on the next one or two days also before returning it to the sender. However, he has neither the power nor the time to make enquiries regarding the whereabouts of the addressee; he is not expected to detain the letter until the addressee chooses to return and accept it; and he is not authorised to affix the letter on the premises because of the assessee's absence. His responsibilities cannot, therefore, be equated to those of a process server entrusted with the responsibilities of serving the summons of a court under Order V of the C.P.C. The Supreme Court further observed that they had to choose the more reasonable, effective, equitable and practical interpretation and that would be to read the word “served” as “sent by post”, correctly and properly addressed to the tenant, and the word “receipt” as the tender of the letter by the postal peon at the address mentioned in the letter. No other interpretation, would fit the situation as it was simply not possible for a landlord to ensure that a registered letter

sent by him gets served on, or is received by, the tenant.

14. Coming to the case of **K. Bhaskaran** v. **Sankaran Vadhyan Balan and another**(supra) the Supreme Court was considering whether a cause of action would arise in a case where the notice was returned with endorsement as “unclaimed” and the Supreme Court held that on the part of the payee he has to make a demand by giving notice in writing. If that was the only requirement to complete the offence on the failure of the drawer to pay the cheque amount within 15 days from the date of “giving” , the travails of the prosecution would have been very much lessened but the legislature says that failure on the part of the drawer to pay the amount should be within 15 days “of the receipt”. It is, therefore, clear that “giving notice” in the context is not the same as receipt of notice. Giving is a process of which receipt is the accomplishment. It is for the payee to perform the former process by sending the notice to the drawer at the correct address. The Court then referred to the Black's Law Dictionary and observed that if a strict interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster cheque drawer would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that the court should not adopt an interpretation which helps a dishonest evader and clips an honest payee as that would

defeat the very legislative measure. Referring to a notice which is unclaimed the Supreme Court proceeded to refer to Section 27 of the General Clauses Act, 1897 and observed further that no doubt Section 138 of the Act does not require that the notice should be given only by "post". Nonetheless the principle incorporated in Section 27 can profitably be imported in a case where the sender has despatched the notice by post with the correct address written on it. Then it can be deemed to have been served on the sendee unless he proves that it was really not served and that he was not responsible for such non-service. Any other interpretation can be proved to lead to a very tenuous position as the drawer of the cheque who is liable to pay the amount would resort to the strategy of subterfuge by successfully avoiding the notice.

15. Mr. Diniz, has also placed reliance on a decision of this Court in the case of **Malanbai Ratnaparkhi** v. **Govind R. Motade and another** (2002 CRI.L.J. 1188) and another decision of the Supreme Court in the case of **State of M.P.** v. **Hiralal** ((1996) 7 SCC 523). This Court referring to the aforesaid decision of the Supreme Court observed that the said decision did not speak about absence of presumption of deemed service once the party is able to establish that the notice as been despatched by registered post with the correct address of the sendee written on it. This Court further observed that the said decision only rules that presumption of demand service should not be drawn as a matter of course and should be decided

based on the facts of each case. Referring to the case of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan and another** (supra) this Court held that once the sender establishes the fact that the notice was despatched by post with correct address written thereon, it should be deemed to have been served on the sendee unless he establishes that it was really not served and that he was not responsible for such non-service. This Court further observed that since the case related to Section 138 of the Act, it was primarily for the petitioner to rebut the presumption regarding the service of notice sent to her by respondent no.1.

16. Mr. Coutinho, has also referred to several decisions, the case of **K. Annaji Rao** v. **N. Krishna Raju Sekhar and another** (2004 CRI.L.J. 2911) being first of them. That was a case where the postal article was returned with endorsement “addressee left” and there was no evidence to show that the notice sent under certificate of posting was in fact served upon the accused and in such a situation the Court proceeded to give benefit of doubt to the accused as regards the service of notice.

17. In the case of Sunil Srivastava v. **Shri Ashok Kalra** (2003(1) DCR 104) the Delhi High Court held that the parties were yet to go for the trial and in the trial they would get an opportunity to adduce evidence to prove whether the notice was received or not and the presumption under Section 27 of the General Clauses Act of

deemed service would depend upon evidence which would be adduced in the trial.

18. In the case of **S. S. Ummul Habiba,Proprietor, M/s. Alim Auto Supplies** v. **B. Rajendran** (2004(3) Crimes 505) the Madras High Court referring to the case of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan** (supra) held that:-

> "27. "Giving Notice" to the drawer in the correct address itself was held to be sufficient in the factual matrix of the case and the same cannot be applied to the case in hand. In my view the return of postal cover as "Intimated-Unclaimed" by itself would not amount to constructive notice when it is not averred by the Complainant in the complaint that the Accused is evading the service. Although, in appropriate cases, deemed service is to be accepted by the Court, such presumption of deemed service is not a matter of course in all cases. To raise the presumption of deemed notice, there should be clear averment in the complaint that the Appellant/Complainant had sent the statutory notice on demand intimating the dishonour of cheque and that the Respondents/Accused were evading the service. In the absence of such averment, no such presumption of deemed notice could be raised".

19. In the case of **M/s. Pawan Enterprises** v. **Satish H. Verma** (2003(2) ALL MR 756) this Court observed that to constitute an offence under Section 138 of the Act, the complainant is obliged to prove its ingredients which include the receipt of notice by the accused under clause (b). It is not the "giving" of the notice which makes the offence but it is the "receipt of the notice by the drawer which gives the cause of action to the complainant to file the complaint within the statutory period". It may be noted that the case of **K. Bhaskaran** v. **Sankaran Vaidhyan Balan** (supra) was not cited before this Court in this case.

20. In the case of **M/s. Shakti Travel & Tours** v. **State of Bihar & another** (2000(7) Supreme 90) the Supreme Court noted that the complaint had not mentioned that the demand notice was served on the accused and, therefore, the Supreme Court proceeded to quash the complaint.

21. In the case of **Sridhar M. A.** v. **Mettaloy N. Steel Corporation** (2000(5) Bom.C.R.) the Supreme Court stated that notice should not be deemed to have been served as a matter of course. Considering the facts of that case, which are not quite clear the Supreme Court, therefore, proceeded to give benefit of doubt to the accused.

22. In the light of facts stated by the complainant in this case and which I have reproduced herein above, the cases cited on behalf of the accused are clearly distinguishable. This is a case where the postal article was returned to the complainant-sender with two endorsements, one “Intimated” and the other “the addressee out of station return to sender”. All that was done by the accused was to suggest that the first endorsement was returned by the complainant itself. The submission that in case the accused was out of station that he could not be intimated has got to be rejected. It is certainly probable that when the postman went with the postal article for the first time that intimation was given and later when an attempt was made for the second time that it was found that the accused was not available to be served with the said notice. In such a situation, the onus was clearly on the accused in the light of the presumption available to the complainant under Section 27 of the General Clauses Act, 1897 and as stated by the Supreme Court in the case of **K. Bhaskaran** v. **Sankaram Vaidhyan Balan** (supra) that he was really not served and he was not responsible for such non-service. In the light of that, the learned Judicial Magistrate, First Class was not right in dismissing the complaint for want of service of notice.

23. Coming to the merits of the case and the presumption available to the complainant under Section 139 of the Act that the cheque was issued for the discharge of debt or liability, Mr. Coutinho has submitted that the conclusion arrived at by the learned Judicial

Magistrate, First Class is a plausible conclusion which the Court sitting in appeal against acquittal ought not to interfere and in support of this submission Mr. Coutinho has placed reliance on a Division Bench Judgment of this Court in the case of **Mehmud Mohammed Chabukswar** v. **State of Maharashtra** (1998(3) Mh.L.J. 731) wherein the Division Bench observed that although the Criminal Procedure Code makes no distinction between the powers of appellate Court in an appeal against conviction from those in an appeal against aquittal but the case law which has crystallized as a result of catena of decisions of the Apex Court is that interference in an appeal against acquittal is to be made only if either the findings on facts are grossly unreasonable or the order of acquittal is manifestly illegal resulting in failure of justice. The Division Bench further observed that the Apex Court, times out of number, has held that in an appeal against acquittal if the view taken by the trial Court is a view which can be categorized as a possible view then the mere circumstance that had the appellate Court been the trial Court, it would have taken a different view will be no reason to reverse the order of acquittal.

24. Mr. Diniz, the learned Counsel of the complainant has submitted that the learned trial Court was very much conscious of the fact that there was a presumption available in favour of the complainant in terms of Section 139 of the Act that the cheque was issued in discharge of the debt or other liability but since the accused

had not led any evidence to rebut the said presumption, the learned Judicial Magistrate, First Class was wrong in giving benefit of doubt to the accused. Mr. Diniz, has placed reliance on the case of **K. N. Beena** v. **Muniyappan and another** (AIR 2001 SC 2895). In this case, the Supreme Court stated that admittedly, the first respondent had led no evidence except some formal evidence and the High Court appeared to have proceeded on the basis that the denials/averments in his reply dated 21-5-1993 were sufficient to shift the burden of proof on to the Appellant/Complainant to prove that the cheque was issued for a debt or liability. This is an entirely erroneous approach. The first respondent had to prove in the trial, by leading cogent evidence, that there was no debt or liability. The first respondent not having led any evidence could not be said to have discharged the burden cast on him. The first respondent not having discharged the burden of proving that the cheque was not issued for a debt or liability, the conviction as awarded by the Magistrate was correct and the High Court had erroneously set aside that conviction.

25. On the other hand, Mr. Coutinho, has submitted that the presumption could be displaced by probablising the defence of the accused and in support of this submission Mr. Coutinho has placed reliance on the Judgment of this Court in the case of **Shri Prabhakar D. Naik** v. **Shri Jerry S. Viegas and another** (2002 ALL MR(Cri) 607) wherein this Court observed that for rebutting the presumption under Section 139 of the Negotiable Instruments Act, 1881, it is not

necessary for the accused to rebut it by proof beyond reasonable doubt. The accused can rebut the said presumption either by leading evidence himself or by relying upon admissions and circumstances as appearing in the evidence of the prosecution. The accused is required to rebut the presumption by preponderance of probabilities. In other words, the accused is required to probablise his defence.

26. Section 139 of the Act deals with presumption in favour of holder, and, it provides that it shall be presumed, unless the contrary is proved, that the holder of a cheque received the cheque, of the nature referred to in Section 138, for the discharge, in whole or in part, of any debt or other liability.

27. There can be no dispute that the said presumption available under Section 139 of the Act in favour of the complainant is a rebuttable presumption. However, that presumption could not be rebutted only by way of suggestions or a statement given by the accused under Section 313 of the Code. The presumption could be rebutted either by the accused leading evidence or bringing facts on record in cross-examination of the complainant which could make the case of the complainant improbable that the cheque was issued in discharge of any debt or other liability or through other documents produced and proved through the complainant. In the case at hand, it is an admitted position that the accused was engaged as a contractor by the complainant-Company and there has been a dispute regarding

the payment of dues of the accused by the complainant regarding which the accused has filed a Civil Suit against the complainant for the recovery of the said dues and I am told across the Bar that the complainant has raised a counter-claim against the accused for an amount of the cheque, namely of Rs.50,000/-. Firstly, it is to be noted that P.W.1, Deepali did not make any categorical statement in her evidence that this cheque was given in repayment of any particular loan of a particular amount. In fact, P.W.1, Deepali did not know the date on which the loan was given, by which of the Directors of the Company it was given or in repayment of which of the different loans, the cheque was given and in such a situation only because a cheque issued by the accused was found with the Company, it could not be presumed that it was given in discharge of a debt or liability. Secondly, in this case the accused was able to show through the cross-examination of P.W.1, Deepali that it is the Company which owed him money on account of the work done by him. In other words, the accused has been able to rebut the presumption that he had no existing debt or liability towards the said Company. Thirdly, P.W.1, Deepali, in terms admitted "that the cheque was given by the accused to them to secure the loan from the Company". The accused has also stated in his statement recorded under Section 313 of the Code that "the cheque was not to be presented for encashment. It was issued towards security", and, if that was the case the complainant was not justified in presenting the said cheque for payment and upon dishonour to initiate proceeding under Section 138 of the Act.

27. I, therefore, find that there is no merit in this appeal. Consequently, the same is hereby dismissed.

N. A. BRITTO, J.

RD.